Supreme Court, U.S.
FILED

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Docket No. _____

IN THE SUPREME COURT OF THE UNITED STATES

M.R. MIKKILINENI, General Partner of Talasila,
Petitioner,

v.

CITY OF HOUSTON, TEXAS, DENNIS LLOYD, RUSSELL MAI, PHILIP BARNARD, GARY ORADAT, UNITED STATES DEPARTMENT OF LABOR, JUAN PADRON, HAROLD DARK, JOHN LAWSON AND ROBIN HORNING,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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12 pp

QUESTION PRESENTED FOR REVIEW

Did the Fifth Circuit Court of Appeals deny Petitioner's right to procedural due process of law when it granted Respondents' Motion to Dismiss his appeal because Petitioner, an uncounseled litigant, filed his pro se brief nine (9) days out of time?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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Docket No. _____

IN THE SUPREME COURT OF THE UNITED STATES

M.R. MIKKILINENI, General Partner of Talasila,
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v.

CITY OF HOUSTON, TEXAS, DENNIS LLOYD, RUSSELL MAI, PHILIP BARNARD, GARY ORADAT, UNITED STATES DEPARTMENT OF LABOR, JUAN PADRON, HAROLD DARK, JOHN LAWSON and ROBIN HORNING,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, M.R. Mikkilineni, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

There were no opinions issued below. Rather, the Fifth Circuit Court of Appeals issued an Order which is reproduced in the Appendix filed herewith App. 2a. The district court's Summary Judgment and Order in this case is reproduced at App. 3a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on February 21, 1997 (App. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved in these cases is the Due Process Clause of the Fifth Amendment to the United States Constitution which states, in pertinent part:

> No person shall be . . . deprived of life, liberty or property without due process of law.

STATEMENT OF THE CASE

In June 17, 1992, the City of Houston entered into a written contract ("The Contract") with Talasila, a partnership registered in Harris County, Texas for the construction of a sewer pump station.

On October 7, 1994, M.R. Mikkilineni, the general partner of Talasila, filed a pro se civil rights suit against the City of Houston, the United States Department of Labor and several individuals in the United States District Court for the Southern District of Texas, based on a cause of action arising from The Contract between Talasila and the City of Houston.

The basis of the complaint was that the municipal defendants, municipal agents, federal agency and federal agency employees discriminated against Mr. Mikkilineni in the way it supervised and enforced The Contract because of Mr. Mikkilineni's race (dark skinned) and national origin (India).

Mr. Mikkilineni had difficulty getting the defendants to comply with the discovery portion of the Federal Rules of Civil Procedure. As a result of not receiving the documents which he requested from the defendants, and to which he was entitled, he was unable to respond adequately to the dispositive motions which the defendants filed.

As a result, on April 12, 1996 the complaint was dismissed on the merits (App. 3a), and Mr. Mikkilineni filed a timely pro se appeal to the Fifth Circuit Court of Appeals on May 10, 1996. (App. 17a). On September 4, 1996, prior to when his brief was due, Mr. Mikkilineni filed an informal request with the court to allow him an additional 74 days in which to file his brief. (App. 16a). On September 23, 1996, the Fifth Circuit granted him an extension of time in which to file his brief until November 30, 1996 and stated that no further extensions would be granted. (App. 14a).

On September 4, 1996, Mr. Mikkilineni filed a pro se appeal to the Fifth Circuit Court of Appeals in the case captioned Talasila, Inc. v. Robert Reich. On or about September 26, 1996, Mr. Mikkilineni requested the Fifth Circuit that these two appeals be reviewed by the same panel of Judges because they were related. The Fifth Circuit took Mr. Mikkilineni's request as a motion to consolidate the two appeals. (App. 15a). As a result, he began to work on a consolidated brief. However, on November 5, 1996, the Fifth Circuit denied the motion to consolidate the cases, so separate briefs had to be filed. (App. 13a).

Mr. Mikkilineni mailed his pro se brief in the instant case to the Fifth Circuit by express mail on December 9, 1996, nine days late. In the cover letter to the brief, Mr. Mikkilineni requested the Fifth Circuit's permission to excuse the delay in submitting his brief and to allow him to file the brief which exceeded the court's 50 page limit. (App. 12a).

On December 12, 1996, the Fifth Circuit wrote to Mr. Mikkilineni that the brief and record had been received but not filed since they were not accompanied by motions to file out of time and to file a brief in excess of the pages. The court stated that the motions had to be received within 10 days. (App. 11a).

On or about December 13, 1996, the City of Houston, et al., filed a motion to dismiss the appeal, and the court notified Mr. Mikkilineni that a response must be filed by December 20, 1996. (App. 8a).

On December 18, 1996, Mr. Mikkilineni sent to the court "Appellant's Motion to File out of Time" and "Appellant's Motion to File in Excess of Pages." (App. 9a & 10a).

On December 19, 1996, Mr. Mikkilineni sent to the court "Appellant's Response to City-Appellees Motion to Dismiss." (App. 7a).

On January 28, 1997, the Fifth Circuit denied Mr. Mikkilineni's motion to file his brief out of time and granted the Appellees' motion to dismiss. (App. 2a).

On February 4, 1997, Mr. Mikkilineni filed a Request for Reconsideration of Denial to Allow Out of Time Filing in Excess Pages (App. 6a) which the Fifth Circuit denied on February 21, 1997. (App. 1a).

In March 1997, Mr. Mikkilineni retained current counsel to represent him in this matter. On March 6, 1997, present counsel filed "Appellant's Motion to Reconsider Order Dismissing Appeal In Banc" (App. 5a) which the court refused to accept for filing. (App. 4a).

REASONS FOR GRANTING THE WRIT

This Court should grant the writ in order to remedy a gross injustice to an uncounseled litigant who was denied due process of law by the Court of Appeals. Petitioner filed a pro se brief in support of his civil rights appeal nine days out of time, and the Court of Appeals refused to consider the merits raised in that brief. This Court is respectfully requested to remedy this situation by remanding this case to the Fifth Circuit Court of Appeals so that it can consider the case on its merits.

I.

THE COURT OF APPEALS DENIED AN UNCOUNSELED LITIGANT HIS RIGHT TO DUE PROCESS OF LAW WHEN IT DISMISSED HIS APPEAL BECAUSE HE FILED HIS BRIEF NINE (9) DAYS OUT OF TIME.

It is respectfully submitted that the Fifth Circuit Court of Appeals' own decisions show that its treatment of Mr. Mikkilineni is inconsistent with its own basic sense of due process fairness in dealing with uncounseled appellants as is guaranteed by the Due Process Clause of the Fifth Amendment to the United States Constitution.

In **Abduel-Alim Amin v. Univ. Life Ins. Co. of Memphis**, 706 F.2d 638 (5th Cir. 1983), the pro se appellant failed to comply with the Federal Rules of Appellate Procedure regarding the submission of his brief, but the Fifth Circuit denied the appellee's motion to dismiss the appeal since the brief, liberally construed, contained assertions of trial error.

Later, in **Price v. Digital Equip. Corp.**, 846 F.2d 1026 (5th Cir. 1988), the Fifth Circuit refused to dismiss the pro se appellant's appeal because he failed to raised any issue on appeal. The brief stated only that "this action is time barred." 846 F.2d at 1028. Not only did the court not dismiss the appeal, but it reversed the lower court's ruling.

Other appellate courts have also held that the rules of appellate procedure are not meant to be used to deny pro se appellants their just due on appeal.

In **McCottrell v. E.E.O.C.**, 726 F.2d 350, 351 (7th Cir. 1984), the pro se appellant filed a one (1) page brief, but the court refused to dismiss it because it set forth his argument.

Likewise, in **Balistreri v. Pacifica Police Department**, 855 F.2d 1421, 1424 (9th Cir. 1988), the court stated "This court recognizes that it has a duty to ensure that pro se litigants do not lose their right to a hearing on the merits of their claim due to ignorance of technical procedural requirements."

It is respectfully submitted that Mr. Mikkilineni should be afforded the same due process rights as these other pro se appellants. Although he filed his lengthy brief nine days out of time, it was filed prior to the date when appellee's filed their motion to dismiss. (App. 12a). See, **Cramer v. Phoenix Mut. Life Ins. Co.**, 91 F.2d 141 (8th Cir. 1937) (Appeal would not be dismissed where counsel's brief was three days late, where brief was filed prior to the motion to dismiss, the delay was accidental and satisfactorily explained and there was no prejudice to appelles.)

This Court has the power to grant certiorari, vacate and remand in a case in which an injustice has been done in the court below. **Lawrence v. Chater,** _U.S._ _ _, 116 S.Ct. 604 (1996).

It is respectfully submitted that, in the case sub judice, the Fifth Circuit Court of Appeals violated Mr. Mikkilineni's right to due process of law because it denied him access to a fair appellate review of his meritorious civil rights appeal. The tardy brief of a pro se litigant which did not prejudice the opposing parties cannot, under the circumstances in the instant case, justify a dismissal of the appeal.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted, or, in the alternative, this Court should use its inherent power to remand this case to the Fifth Circuit Court of Appeals with instructions to consider the case on its merits.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX

1a -- ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED FEBRUARY 21, 1997

2a -- ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED JANUARY 28, 1997

3a -- FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DATED APRIL 12, 1996

4a -- LETTER FROM FIFTH CIRCUIT COURT OF APPEALS TO MICHAEL ROSENFIELD DATED MARCH 14, 1997

5a -- APPELLANT'S MOTION TO RECONSIDER ORDER DISMISSING APPEAL IN BANC DATED MARCH 6, 1997

6a -- APPELLANT'S REQUEST FOR RECONSIDERATION OF DENIAL TO ALLOW OUT OF TIME FILING IN EXCESS PAGES DATED FEBRUARY 4, 1997

7a -- APPELLANT'S RESPONSE TO CITY-APPELLEES MOTION TO DISMISS DATED DECEMBER 19, 1996

8a -- APPELLEE'S MOTION TO STRIKE APPELLANT'S BRIEF AND DISMISS APPEAL DATED DECEMBER 11, 1996

9a -- APPELLANT'S MOTION TO FILE OUT OF TIME DATED DECEMBER 18, 1996

10a -- APPELLANT'S MOTION TO FILE IN EXCESS OF PAGES DATED DECEMBER 18, 1996

11a – LETTER FROM FIFTH CIRCUIT COURT OF APPEALS TO M.R. MIKKILINENI DATED DECEMBER 12, 1996

12a – M.R. MIKKILINENI'S COVER LETTER DATED DECEMBER 9, 1996 TO THE FIFTH CIRCUIT COURT OF APPEALS

13a – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED NOVEMBER 5, 1996

14a – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED SEPTEMBER 23, 1996

15a – M.R. MIKKILINENI'S REQUEST OF 9/19/96 THAT ONE PANEL OF JUDGES OF THE FIFTH CIRCUIT COURT REVIEW TWO RELATED APPEALS – MIKKILINENI V. CITY OF HOUSTON, AND TALASILA INC. V. ROBERT REICH

16a – M.R. MIKKILINENI'S REQUEST OF SEPT. 4, 1996 TO THE FIFTH CIRCUIT FOR 74 DAYS EXTENSION TO FILE HIS BRIEF

17a – M.R. MIKKILINENI'S NOTICE OF APPEAL DATED MAY 10, 1996

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-20471

Filed
Feb. 21, 1997

M R MIKKILINENI, General Partner of Talasila
Plaintiff - Appellant

v.

THE CITY OF HOUSTON, Et Al
Defendants

THE CITY OF HOUSTON; JUAN PADRON, HAROLD DARK; JOHN LAWSON; ROBIN HORNING; DENNIS LLOYD; RUSSELL MAI; PHILIP BARNARD; GARY ORADAT
Defendants - Appellees

- - - - - - - - - - - - - - - - - - - -

Appeal from the United States District Court for the
Southern District of Texas, Houston

- - - - - - - - - - - - - - - - - - - -

Before JONES, DeMOSS, and PARKER, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellant's request for reconsideration of denial to allow out of time filing in excess pages, treated as motion for reconsideration of this court's order of January 28, 1997 is DENIED.

SD

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-20471

Filed
Jan. 28, 1997

M R MIKKILINENI, General Partner of Talasila
Plaintiff - Appellant

v.

THE CITY OF HOUSTON, Et Al
Defendants

THE CITY OF HOUSTON; JUAN PADRON, HAROLD DARK; JOHN LAWSON; ROBIN HORNING; DENNIS LLOYD; RUSSELL MAI; PHILIP BARNARD; GARY ORADAT
Defendants - Appellees

Appeal from the United States District Court for the
Southern District of Texas, Houston

Before JONES, DeMOSS, and PARKER, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellant's motion for leave to file his brief and record excerpts out of time is DENIED.

IT IS FURTHER ORDERED that appellant's motion for leave to file brief in excess pages, but not to exceed 68 pages is DENIED.

IT IS FURTHER ORDERED that appellant's motion for leave to file record excerpts in excess of optional contents, but not to exceed 300 pages is DENIED.

IT IS FURTHER ORDERED that the motion of appellees, City of Houston, Gary Oradat, Russell Mai, Dennis Lloyd, and Philip Barnard, to strike appellant's brief is DENIED AS MOOT.

IT IS FURTHER ORDERED that the motion of appellees, City of Houston, Gary Oradat, Russell Mai, Dennis Lloyd, and Philip Barnard, to dismiss the appeal is GRANTED.

SD

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Entered
APR 12, 1996

M.R. MIKKILINENI, trustee/general partner of Talasila,
Plaintiff,

v.

CIVIL ACTION NO. H-94-3552

CITY OF HOUSTON, DENIS LLOYD, RUSSELL MAI, PHILIP BARNARD, GARY ORADAT, UNITED STATES DEPARTMENT OF LABOR, JUAN PADRON, HAROLD DARK, JOHN LAWSON, and ROBIN HORNING,
Defendants

FINAL JUDGMENT

For the reasons set forth in the Memorandum and Order signed August 1, 1995, and the Memorandum and Order signed this day, it is

ORDERED and ADJUDGED that Plaintiff's claims against Defendants Denis Lloyd, Russell Mai, Philip Barnard, Gary Oradat, United States Department of Labor, Juan Padron, Harold Dark, John Lawson, and Robin Horning, and Plaintiff's federal law claims against Defendant City of Houston are DISMISSED on the merits. It is further

ORDERED and ADJUDGED that Plaintiff's state law breach of contract claim against Defendant City of Houston is DISMISSED without prejudice to Plaintiff's refiling the claim in the appropriate state court. Plaintiff is reminded that period of limitations for his state law claim is tolled for a period of thirty

(30) days after the claim is dismissed unless state law provides for a longer tolling period. 28 U.S.C. @ 1367(d).

This is a FINAL JUDGMENT.

The Clerk will enter this Order and send copies to all counsel of record.

SIGNED at Houston, Texas, on this the 12th day of April, 1996.

SD

EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Entered
APR 12, 1996

M.R. MIKKILINENI, trustee/general partner of Talasila,
Plaintiff,

v.

CIVIL ACTION NO. H-94-3552

CITY OF HOUSTON, DENNIS LLOYD, RUSSELL MAI, PHILIP BARNARD, GARY ORADAT, UNITED STATES DEPARTMENT OF LABOR, JUAN PADRON, HAROLD DARK, JOHN LAWSON, and ROBIN HORNING,
Defendants

MEMORANDUM AND ORDER

Pending are Defendants City of Houston, Russell Mai, Dennis Lloyd, Philip Barnard, and Gary Oradat's ("the City Defendants'") Motion for Summary Judgment or in the Alternative, Motion for Partial Summary Judgment (Document No. 84), and Defendants Juan Padron, Harold Dark, and John Lawson's ("the individual Federal Defendants'") Second Motion to Dismiss, in the Alternative, Motion for Summary Judgment (Document No. 85). After having carefully considered the arguments, authorities, and summary judgment evidence submitted by counsel, the Court concludes that the City Defendants' Motion should be GRANTED.

I. Background

The general background for this case is described in the

Court's Memorandum and Order signed August 1, 1995 ("the Court's prior Order"), ruling on the Federal Defendant's first Motion to Dismiss. With the additional note that Plaintiff is now represented by counsel and no longer pursues this action pro se, that description is adopted here.

II. Discussion

A. Standard of Review

Rule 56(c) provides that "[summary judgment] shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed R. Civ. P. 56(c). A party seeking summary judgment bears the initial burden of informing the district court of the basis for the motion, and identifying those portions of the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which the moving party believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554 (1986).

Once the movant carries this burden, the burden shifts to the nonmovant to show that summary judgment should not be granted. Id. at 2553-54. A party opposing a properly-supported motion for summary judgment may not rest upon mere allegations or denials of his pleading, but must set forth specific facts showing the existence of a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57, 106 S. Ct. 2505, 2514-15 (1986). Unsubstantiated or conclusory assertions that a fact issue exists will not suffice. See Kris v. BancTexas Group, Inc., 989 F.2d 1435, 1442 (5th Cir. 1993); Thomas v. Price, 975 F.2d 231, 235 (5th Cir. 1992). The nonmovant "must adduce admissible evidence which creates a fact issue concerning the existence of

every essential component of that party's case." Krim, 989 F.2d at 1442.

In considering a motion for summary judgment, the district court must view the evidence through the prism of the substantive evidentiary burden. Anderson, 106 S. Ct. at 2513-14. All justifiable inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986). "If the record, viewed in this light, could not lead a rational trier of fact to find" for the nonmovant, summary judgment is proper. Kelley v. Price Macemon, Inc. 992 F.2d 1408, 1413 (5th Cir. 1993), cert. denied, 114 S. Ct. 688 (1994), citing Matsushita, 106 S. Ct. at 1351. On the other hand, if "the factfinder could reasonably find in [the nonmovant's] favor, then summary judgment is improper" id., citing Anderson, 106 S. Ct. 2511.

Finally, even if the standards of Rule 56 are met, a court has discretion to deny a motion for summary judgment if it believes that "the better course would be to proceed to a full trial. Anderson, 106 S. Ct. at 2513. Accord, Veillon v. Exploration Services, Inc., 876 F.2d 1197, 1200 (5th Cir. 1989); 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure @ 2728 (1983).

B. Plaintiff's Claims

While Plaintiff is now represented by counsel, the live pleading in this case remains the pro se Amended Complaint filed by Plaintiff on May 10, 1995. The Amended Complaint designates five causes of action brought by Plaintiff against Defendants. As noted in the Court's prior Order, this Complaint is no model of clarity. Nonetheless, construing the Complaint liberally, see Haines v. Kerner, 92 S. Ct. 594 (1972), and in light of the Court's prior Order dismissing certain claims against the Federal

Defendants, five remaining claims can be adduced from Plaintiff's pleading: (1) a claim against Lloyd, Mai, Barnard, and Oradat pursuant to 42 U.S.C. @ 1981 ("@ 1981"); (2) a claim against the City of Houston and its agents Lloyd, Mai, and Barnard pursuant to 42 U.S.C. @ 1983 ("@ 1983") for violation of Plaintiff's due process rights under the Fourteenth Amendment; (3) a claim against Lloyd, Mai, and Barnard, and the individual Federal Defendants (Padron, Dark, and Lawson) in their individual capacities pursuant to 42 U.S.C. @ 1985(3) ("@ 1985") for conspiracy to violate Plaintiff's right to the equal protection of the laws on account of Plaintiff's national origin (India); (4) a state law breach of contract claim against the City of Houston; and (5) a claim against the individual Federal Defendants in their individual capacities pursuant to Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 91 S. Ct. 1999 (1971), for violation of Plaintiff's Fourth Amendment right to be free from unreasonable searches and seizures.

In order to recover on his @ 1981 claim against the individual City Defendants, Plaintiff must prove that said Defendants intentionally denied him the right to make and enforce contracts because of his ethnicity. See General Bldg. Contractors Ass'n v. Pennsylvania, 102 S. Ct. 3141, 3146-50 (1982); Vaughn v. Pool Offshore Co., 683 F.2d 922, 926-27 (5th Cir. 1982). Likewise, as to Plaintiff's @ 1985 claim, Plaintiff must prove that the alleged conspiracy between City Defendants Lloyd, Mai, and Barnard and the individual Federal Defendants, who were employees of the U.S. Occupational Safety and Health Administration ("OSHA"), to search Plaintiff's work site illegally and wrongfully issue Plaintiff OSHA citations was motivated by anti-Indian animus. See United Broth. of Carpenters and Joiners v. Scott, 103 S. Ct. 3352, 3359 (1983); Hilliard v. Ferguson, 30 F.3d 649, 653 (5th Cir. 1994).

While the summary judgment evidence reveals that Plaintiff has had personality conflicts and contract/design/safety disputes with almost everyone he has encountered in connection

with the construction of the Mississippi Street pump station ("the pump project"), there is no summary judgment evidence in the record that so much as raises a fact issue that any of these difficulties were the result of anti-Indian animus or discrimination on the part of the named Defendants. The summary judgment evidence that Plaintiff proffers in support of his claim of national origin discrimination either does not raise a fact issue on discrimination,[1] or even tends to establish the opposite.[2] While

[1] Plaintiff makes much of the fact that Defendant Lawson could not recall the City of Houston having previously called OSHA with a concern about work site safety. Even if OSHA had not been notified of safety concerns with regard to other City contractors -- of any race or nationality -- this fact alone does not raise an inference that OSHA was referred to the work site of Plaintiff's company, Talasila, because Plaintiff is Indian. The uncontroverted testimony of Defendant Lloyd is that OSHA was not asked to inspect other City work sites with similar safety problems because those contractors immediately corrected the identified problems. Indeed, Plaintiff's own summary judgment evidence includes a copy of a letter from the City reprimanding a contractor for permitting a subcontractor to fail properly to provide trench safety. The contractor and subcontractor responded with letters stating that remedial action had been taken and that the safety lapse would not happen again. In contrast, Plaintiff states in his deposition that he did nothing about the excavation safety concerns expressed by the City before the first OSHA inspection because "[t]here is no need to do anything." (Document No. 85, Ex. G-1 at 299-303).

Plaintiff also complains that Defendant Oradat made a derogatory comment to him by calling Plaintiff's superintendent a "cowboy." Further, Plaintiff accuses Lloyd of using an ethnic slur against him because Lloyd allegedly accused Plaintiff of criminal activity. To call one a "cowboy" or to accuse one of criminal activity -- however objectionable such remarks may be for other reasons -- is no evidence of national origin discrimination.

[2] Plaintiff complains that some of his numerous proposed redesigns of the pump project were rejected on the ground that it

Plaintiff asserts that the facts supporting his contention of national origin discrimination "basically is the result speaks for itself," (Document No. 85, Ex. G-1 at 513), neither a subjective belief of discrimination, nor conclusory assertions of such, will suffice to raise a genuine issue of material fact precluding summary judgment on Plaintiff's @ 1981 and @ 1985 claims. See Summary Judgment Standard, supra; Myers v. Becker County, 833 F. Supp. 1424, 1435 (D. Minn. 1993); Taliaferro v. Voth, 774 F. Supp. 1326, 1332 (D. Kan. 1991).

With regard to Plaintiff's Bivens claim against the individual Federal Defendants for violation of his Fourth Amendment right to be free from unreasonable searches and seizures, there is no summary judgment evidence that anything was ever seized from the work site or from Plaintiff's office. Accordnigly, Plaintiff complains of searches that took place pursuant to the individual Federal Defendants' OSHA inspections of the work site.

As noted in the Court's prior Order, governmental property owners may give valid consent to OSHA inspectors to search the commonly-controlled areas of work sites operated by private companies. Donovan v. A.A. Beiro Constr. Co., 746 F.2d 894 (D.C. Cir. 1984); Nat'l Eng'g & Contracting Co. v. U.S. Dept. of Labor, Occupational Safety & Health Admin., 687 F. Supp. 1219,

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would be unfair to contractors who unsuccessfully bid on the original design and would not be able to bid on the redesign. Plaintiff also complains that his payment schedule was derived from one used on a similar project by a white contractor. This evidence suggests, if anything, a conscious effort on the part of the City Defendants to treat all contractors equally. Indeed, Mr. Lloyd testified that he felt that the front-loaded payment schedule he used for Talasila disadvantaged the City, but because it had been given to the other contractor, "I gave that up in favor of treating everybody equal." (Document No. 93, Ex. 2 at 30-31).

1221 (S.D. Ohio 1988), aff'd, 902 F.2d 34 (6th Cir. 1990). It is undisputed that the City of Houston owned the land upon which the work site was located and that the individual Federal Defendants conducted their inspections pursuant to an invitation or request from agents of the City. Furthermore, Plaintiff admitted in his deposition that he did not have exclusive control of the work site, that City representatives had a right to be on the premises, and, indeed, that anyone, including OSHA inspectors, had a right to come to the job site as long as they did not interfere with the work.

Plaintiff asserts, however, that the City of Houston could not have validly consented to the searches because Plaintiff was on the work site at the time and never consented or inetnded to consent. This "absence" requirement for valid third-party consent that Plaintiff reads into United States v. Matlock, 94 S. Ct. 988 (1974), however, is inconsistent with Fifth Circuit law. In United States v. Baldwin, 644 F.2d 381, 383 (5th Cir. 1981), the Fifth Circuit held that a wife could give valid consent to a search of an automobile that she appeared jointly to conrol with her husband even though the husband, who was suspected of having robbed a bank, was present at the scene and refused to consent. See also United States v. Hendrix, 595 F.2d 883, 885 (D.C. Cir. 1979) (wife may validly consent to search of jointly-controlled premises despite husband's refusal to consent); United States v. Sumlin, 567 F.2d 684, 687-88 (6th Cir. 1977) (same). This conclusion is consistent with the rationale of Matlock that one who jointly occupies or conrols premises with others has "assumed the risk that one of their number might permit the common area to be searched." 94 S. Ct. at 993. See also United States v. Rizk, 842 F.2d 111, 113 (5th Cir. 1988). Accordingly, the City of Houston could validly consent to warrantless OSHA searches of the work site.

While a governmental property owner cannot validly consent to OSHA searches of areas over which it lacks dominion, Tri-State Steel Consr., Inc. v. Occupational Safety & Health Review Comm., 26 F.3d 173, 177 (D.C. Cir. 1994), *cert. denied*,

115 S. Ct. 1355 (1995), Plaintiff does not argue that the summary judgment evidence is sufficient even to raise a fact issue on whether Plaintiff had exclusive dominion and control and thus, a legitimate expectation of privacy, over any areas that were searched during the OSHA inspections. Although Plaintiff had a trailer office on the work site where he initially encountered Defendant Padron during the first inspection, the uncontroverted testimony of Roger Boulet, who was assigned to the work site by the City, is that the trailer housed both Plaintiff's and Mr. Boulet's offices, that the doors and telephones to the offices were used interchangeably, that Plaintiff's office remained open throughout the day, and that Plaintiff's office was used as an office for other contractors on the work site. It is also uncontroverted that this trailer was on the premises only during the first OSHA inspection. While Plaintiff makes a vague reference in his deposition to Defendants Dark and Lawson going into his "other office" without telling him, no claim is made or evidence presented that Plaintiff exercised exclusive dominion and control over an "other office" either. Accordingly, the uncontroverted evidence of record demonstrates as a matter of law that the consent of the City of Houston was effective to render the warrantless searches of Plaintiff's offices constitutional. See United States v. Richard, 994 F.2d 244, 250 (5th Cir. 1993) ("No evidence was proffered to suggest that [the hotel room tenant] had limited [his co-tenant's] access to the empty suitcases, trash bags, and dryer sheets."); United States v. Smith, 930 F.2d 1081, 1085 (5th Cir. 1991) ("While the government met its burden of proof [of showing consent by a joint tenant], defendant produced no evidence that his wife's access to the residence was limited.").

In any event, the Supreme Court has held that a search is constitutional if consent is given by a person who the officer reasonably, but mistakenly, believed had joint authority over the premises. Illinois v. Rodriguez, 110 S. Ct. 2793, 2800 (1990). The uncontroverted evidence is that the City of Houston owned the work site, that the pump project was a City project, and that the City maintained representatives and, at least during the first inspection, an office jointly occupied with Plaintiff on the site.

There is no evidence of record that Plaintiff limited access to his own offices. It is also uncontroverted that OSHA sent inspectors to the work site not only with the consent of the City, but at the City's request. Under these facts, it cannot be held that the individual Federal Defendants' belief that they had valid consent to search the entire work site was unreasonable. (See Richard, 994 F.2d at 250) ("Unless the complaining co-tenant has somehow limited the other's access to a piece of property, the consenting co-tenant's authority extends to all items on the premises.").[3]

Accordingly, Plaintiff has failed to raise a fact issue that the individual Federal Defendants violated his Fourth Amendment rights. Plaintiff has also failed to demonstrate that these Defendants violated clearly-established rights of which a reasonable officer under the circumstances would have known. These Defendants therefore also have qualified immunity to Plaintiff's claims. See Harlow v. Fitzgerald, 102 S. Ct. 2727, 2738 (1982); Gibson v. Rich, 44 F.3d 274, 277 (5th Cir. 1995).

Plaintiff also asserts a @ 1983 claim against the City of Houston, Lloyd, Mai, and Barnard for violation of Plaintiff's due process rights under the Fourteenth Amendment. In a @ 1983 action Plaintiff must first identify a protected life, liberty, or property interest, and then prove that governmental action resulted

[3] Moreover, Plaintiff admits that Mr. Padron identified himself as an OSHA inspector when he first entered the trailer. When asked in his deposition if he ever asked Padron to leave, Plaintiff replied, "I don't know if I would disrespectfully treat somebody who came to my office." (Document No. 83, Ex. 3 at 461). Plaintiff also could not recall Padron opening anything or moving anything with his hands. Accordingly, any "search" of Plaintiff's office by Padron would have been of items in plain view seen from a vantage point where Padron had implicit permission to be. See Donovan v. Burlington Nothern Inc., 521 F. Supp. 99, 102 n.3 (D. Mont. 1981) ("plain view" principles apply in OSHA context), *rev'd on other grounds*, 694 F.2d 1213 (9th Cir. 1982).

in a deprivation of that interest. San Jacinto Savings & Loan v. Kacal, 928 F.2d 697, 700 (5th Cir. 1991). So far as can be adduced from Plaintiff's Amended Complaint, Plaintiff claims that these City Defendants have deprived him of his reputation and his right to participate in public contract bidding.

While Plaintiff claims that he has lost the opportunity for further business under the Talasila name, there is no summary judgment evidence indicating that the City of Houston or its agents have provided Plaintiff or any Talasila company from exercising the claimed right to bid on public projects. To the contrary, while the pump project at issue in this case was completed in July of 1993, Plaintiff admits in his deposition that Talasila, Inc., his present employer, bid on a City of Houston project in 1994, and did not receive the project because it was not the low bidder.

Plaintiff also claims that the City Defendants damaged his reputation by making stigmatizing statements to third parties. Damage to reputation alone, however, is not actionable under @ 1983. Id. at 701. Plaintiff must also plead and prove "stigma-plus;" that is, stigma plus an infringement of some other life, liberty, or property interest protected under the due process clause. Id. at 701-02. Liberally construing Plaintiff's Amended Complaint, it appears that Plaintiff claims that his liberty interest in operating a legitimate business, see id. at 702, was damaged by false statements on the City's performance evaluation of Talasila and to Talasila's surety and bonding companies.

Defendant Lloyd states in his deposition and affidavit, however, that Talasila's performance evaluation was never published to anyone other than Talasila. Plaintiff himself admits in his deposition that he has no knowledge that the evaluation was ever provided to any third party. See Blackburn v. City of Marshall, 42 F.3d 925, 936 n.10 (5th Cir. 1995) ("A prerequisite to raising a liberty interest claim based on stigma is that the statement be made public by the defendant.").

Plaintiff's Amended Complaint also alleges that the City and Lloyd reported false information to Plaintiff's surety, thus causing Plaintiff to lose his bonding capacity. The summary judgment evidence regarding communications between the City and surety or bonding companies, however, consists of (1) a March 1993 form that Talasila's surety on the pump project, Contractors Bonding & Insurance Agency, Inc., submitted to Lloyd to fill out regarding the status of the project, and (2) Lloyd's deposition testimony that he may have made reports to Talasila's bonding company, American Bonding Company, in April 1993, also regarding the status of the project. The summary judgment evidence does not establish any falsity in these reports. Moreover, Plaintiff otherwise points to no summary judgment evidence raising a fact issue that Lloyd knowingly gave any company false information designed to interfere with Plaintiff's right to operate a legitimate business. The only summary judgment evidence on this issue, in fact, is Lloyd's affidavit that he nevermade false statements to a bonding company. See id. at 936 (only false factual statements potentially give rise to stigma-plus @ 1983 liability).

Plaintiff also points to no summary judgment evidence raising a fact question as to whether false information from the City Defendants stigmatized Plaintiff. See id. (to be stigmatizing, charges must give rise to badge of infamy, public scorn, or the like). Indeed, out of the entire summary judgment record one may find only Plaintiff's triple hearsay deposition statement that Plaintiff's bonding agent told Plaintiff that an unidentified person from American Bonding Company told the agent that an unidentified person from the City of Houston gave the unidentified person from American Bonding Company a "bad" reference regarding Plaintiff. (Document No. 85, Ex. G-1 at 84-85).[4]

[4] Similarly, Plaintiff submits a vague, double hearsay, statement in his affidavit that an unidentified agent of Cranberry Township, Pennsylvania told Plaintiff that "reputation damage" from an unidentified agent of the City of Houston caused Cranberry Township to reject Talasila, Inc.'s low bid on a public works project. (Document No. 93, Ex. 8 at 2).

The general lack of material summary judgment evidence, and the vague, conclusory, and incompetent purported "evidence" that does appear, simply does not suffice to raise a genuine issue of material fact as to Plaintiff's required showing that Defendants City of Houston, Lloyd, Mai, or Barnard deprived Plaintiff of a life, liberty, or property interest protected under the due process clause of the Fourteenth Amendment and @ 1983. Accordingly, these Defendants are entitled to summary judgment.

Having concluded that summary judgment should be granted as to all claims over which this quote has original jurisdiction, the court declines to exercise supplemental jurisdiction over Plaintiff's state law breach of contract claim against the City of Houston. 28 U.S.C. at 1367 [c]. Such matters are better dealt within the state courts of Texas. C.S. Parker & Parsley Petroleum Co. v. Dresser Industries, 972 F.2d 580, 585 [5th Circuit 1992] ["Our general rule is to dismiss state claims when the federal claims to which they are pendant or dismissed."]. [5]

III. Order

For the foregoing reasons, it is

ORDERED that Defendants Juan Padron, Herold Dark, and John Lawson's Alternative Motion for Summary Judgment

[5] The quote does not have diversity jurisdiction over Plaintiff's state law claim. Although Plaintiff appears to have moved from Texas to Pennsylvania after the filing of this case, Plaintiff pled in his complaint and in his Amended Complaint filed on February 10, 1995, that he is a citizen of the state of Texas, see Freeport-McMoran, Inc. v. KN Energy, Inc., 111 S. Ct. 858, 859-60 [1991, cert. denied, 112 S. Ct. 1245 [1992] [citizenship for diversity purposes assessed at the time that an action is filed] and, as recently as February 26, 1996 Plaintiff has, in his briefing to the court, again confirmed that he is a Texas citizen.

[document 85] is GRANTED. Plaintiff's claim against these defendants are DISMISSED on the merits. It is

FURTHER ORDERED that Defendants City of Houston, Russell Mai, Denis Lloyd, Philip Barnard, and Gary Oradat's Motion for Summary Judgment [document 84] is GRANTED. As to Plaintiff's claims against defendants Mai, Lloyd, Barnard, and Oradat, and Plaintiff's federal law claims against defendant City of Houston. These claims against these defendants are DISMISSED on the merits. The court declines to exercise supplemental jurisdiction over Plaintiff's remaining state law breach of contract claim against defendant City of Houston. Accordingly, Plaintiff's state law claim is DISMISSED without prejudice to Plaintiff's refiling the claim in the appropriate state court. Plaintiff should take note that the period of limitations for the dismissed state law claim is tolled for an additional period of thirty [30] days after the claim is dismissed unless state law provides for a longer tolling period. 28 U.S.C. at 1367[d].

The clerk will enter this order and send copies to all counsel of record.

Signed at Houston, Texas, on the 12th day of April 1996.

SD

EWING WERLEIN, JR.
U.S. DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
Fifth Circuit
Office Of The Clerk

CHARLES R. FULBRUGE III
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

March 14, 1997

Mr. Michael L. Rosenfield
Attorney at Law
1808 Law & Finance Bldg.
Pittsburgh, PA 15219

No. 96-20471 Mikkilineni v. The City of Houston
USDC No. CA-H-94-3552

Dear Counsel:

Your motion was received on 3/7/97.

No action is being taken on your document as it is untimely. Returned herewith is your motion to reconsider order dismissing appeal en banc.

Sincerely,

CHARLES R. FULBRUGE III, Clerk
SD
By: _____
Carol LeSage, Deputy Clerk

cc: Ms. Andrea Chan
Ms. Eleanor Ann Robinson-Gaither

MISC-7

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-20471

M.R. MIKKILINENI, General Partner of Talasila,
Plaintiff - Appellant

v.

THE CITY OF HOUSTON, ET AL
Defendants-Appellees

APPELLANT'S MOTION TO RECONSIDER ORDER
DISMISSING APPEAL IN BANC

COMES NOW, M.R. Mikkilineni, appellant above-named, by his lawyer, Michael L. Rosenfield, and submits the following in support of his Motion to Reconsider Order Dismissing Appeal In Banc:

1. Appellant, who is not an attorney, proceeded to file a pro se appeal from the district court's grant of summary judgment to appellees to this court.

2. On September 4, 1996 Appellant filed an informal request with this court to allow him an additional 74 days in which to file his brief.

3. On September 23, 1996 this court granted Appellant's request to file his brief by November 30, 1996 and stated in its order that no further extensions will be granted.

4. On December 9, 1996 Appellant sent to this court by express mail seven copies of his brief and four copies of the reproduced record and requested in his cover for this court to excuse the one week delay in filing his brief.

5. On January 28, 1997 this court denied Appellant's motion for leave to file his brief and record out of time and granted Appellees' motion to dismiss the appeal.

6. On or about February 4, 1997 Appellant filed a pro se Request for Reconsideration of Denial to Allow Out of Time Filing in Excess Pages" which this court denied on February 21, 1997.

7. Subsequent to this court's denial of the request for reconsideration, Appellant hired the undersigned as his counsel in this matter.

8. The undersigned has been practicing law for more than 24 years and has been admitted to the bar of the Tenth and Third Circuit Courts of Appeal as well as the Supreme Courts of Pennsylvania and New Mexico, before all of which he has briefed and argued cases.

9. The undersigned reviewed Appellant's pro se brief to this court and determined that this court acted properly in granting the motion to dismiss because, inter alia, Appellant's brief is incoherent and does not follow the Federal Rules of Appellate Procedure.

10. Appellant is a foreign-born American citizen who had a fool for a client when representing himself before this court.

11. Appellant has a meritorious appeal which he has not properly presented to this court.

12. Appellant did not appreciate the significance of not following this court's rules and orders.

13. If this court was to exercise its discretion and reinstate this appeal, the undersigned will file a motion with the court requesting it to grant Appellant the right to file an amended brief which will be coherent and will comply with the Federal Rules of Appellate Procedure as well as this court's rules and orders.

14. It is respectfully submitted that this court would be denying Appellant his right to due process of law as is guaranteed by the Fifth Amendment to the United States Constitution if did not reinstate Appellant's appeal in this matter.

WHEREFORE, Appellant respectfully requests this court in banc to reconsider its order dismissing his appeal and to allow him the opportunity to file a motion with this court to have his counsel file an amended brief and appendix out of time.

Respectfully submitted,

Dated: March 6, 1997

Michael L. Rosenfield
Pa. I.D. No. 16480
1808 Law & Finance Bldg.
Pittsburgh, PA 15219
412/281-6800

Lawyer for Appellant
M.R. Mikkilineni

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

M.R. Mikkilineni, General partner
Plaintiff - Appellant

v. NO: 96-20471

City of Houston, et. al. (D.C. NO: CA-H-94-3552)
Defendants-Appellees

APPELLANT'S REQUEST FOR RECONSIDERATION OF DENIAL TO ALLOW OUT OF TIME FILING IN EXCESS PAGES

AND NOW, comes M.R. Mikkilineni, pro-se appellant with a request to this Honorable Court to reconsider appellant's motion to allow filing brief/record excerpts out of time and in excess pages, and submit the facts as follows:

1. On 2/1/97 appellant received the Court order filed on 1/28/97 which denied appellant's motions to allow filing brief/record excerpts out of time and in excess pages.

2. Appellant's first request to extend time to file brief/record excerpts in this case was made on or about 9/2/96, and with an order of 9/23/96 the Court granted extension of time until 11/30/96. However, on or about 11/5/96 the Court denied Appellant's request to consolidate the brief of this case with another related case, and ordered that these two appeals will proceed separately.

3. For lack of clear understanding of the workings of the court system/local rules and appellate procedures, appellant went ahead

with working and framing the issues mistakenly assuming a single brief/record excerpts would be sufficient for both of these related cases. However, by the time the Court order of 11/5/96 for two separate briefs was received to appellant there was less than three weeks of time left to finalize two separate briefs/record excerpts. Because of this time lapse and lack of expertise, appellant had to work hard/deligently between 11/5/96 and 11/30/96 on two separate briefs all over again from the start. Therefore, it took more time than anticipated to frame the issues, list all relevant facts and make the argument; and these two case briefs were due in this Court around the same time period. Finally, the brief/record excerpts in this case was submitted to the Court on 12/9/96 by Fedexp and properly served on City/Federal defendants by US mail.

4. M.R. Mikkilineni, a pro-se appellant worked hard to do it timely and reduce the pages, but due to time squeeze and lack of expertise/skill in framing complex issues, such as in this matter, he could not do it any better within the time allowed; and that is the TRUTH. As the deadline for filing approached, M.R. Mikkilineni felt so close to the finish line and every day hoped the work would be done and ready to go the next day; but it dragged on and on for an additional week before all the facts can be put together to the best of appellant's ability, in the words of those who testified under OATH. Certainly, appellant would have filed motions 10 days in advance requesting for leave of the Court to allow filing of brief/record excerpts out of time and in excess pages, if M.R. Mikkilineni knew that he will face unexpected problems in framing the issues and putting together the supporting facts/argument etc. The brief took an additional one week due to the conditions beyond appellant's control and that was a good cause to allow enlargement of time to file, since the denial would result in total INJUSTICE.

5. The Appellees are not prejudiced in anyway because of this out of time filing; in fact they are at an advantage position with additional free time to prepare response to the issues framed by

appellant. Appellant (or his new attorney) will edit the brief and bring it to 50 pages and also remove the excess pages from the record excerpts and include them as part of an appendix if the Court would permit.

6. Attorney Pushinsky with expertise in Civil/Constitutional Law and appellate practice has agreed to that he or another Lawyer will represent appellant in these proceedings (attorney's affidavit attached) with Court's permission, if this Honorable Court would be kind enough to reconsider appellant's request and allow to file the brief/record excerpts out of time.

Respectfully submitted,

SD

M.R. Mikkilineni, PE
PO Box 699, Ingomar, PA 15127

I certify that a true and correct copy of this motion is sent by US mail on 2/4/97 to the following:

1. Andrea Chan, Esq.
2. Eleanor Robinson-Gaither, Esq.

M.R. Mikkilineni

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-20471

M.R. MIKKILINENI, General Partner of Talasila
Plaintiff - Appellant

v.

THE CITY OF HOUSTON, et al.,
Defendants

THE CITY OF HOUSTON; JUAN PADRON; HAROLD DARK; JOHN LAWSON; ROBIN HORNING; DENIS LLOYD; RUSSELL MAI; PHILIP BARNARD; GARY ORADAT
Defendants - Appellees

AFFIDAVIT OF JON PUSHINSKY

I, Jon Pushinsky, having been duly sworn according to law, do hereby state as follows:

1. I am an attorney at law licensed to practice before the Supreme Court of Pennsylvania, the United States District Court for the Western District of Pennsylvania, the United States Court of Appeals for the Third Circuit and the United States Supreme Court.

2. I am an experienced appellate lawyer.

3. Mr. Mikkilineni, the Appellant in the above referenced matter, has requested that I represent him in an effort to obtain reconsideration of the court's order of January 28, 1997.

4. I advised Mr. Mikkilineni that I or another lawyer from my office would assume responsibility for his appeal only if the court reconsidered its January 28 order and engaged in a merits review of the case.

5. Should the court reinstate Mr. Mikkilineni's appeal, this office would review the briefs, prepare a reply brief if one is appropriate and participate in any argument scheduled by the court.

SD

_____

Jon Pushinsky, Esquire
Pa. I.D. No. 30434
1808 Law & Finance Building
Pittsburgh, PA 15219
(412) 281-6800

Sworn to and subscribed
before me this 4th day
of February, 1997

SD

_____

Notary Public

Notarial Seal
Kelly L. Nixdorf, Notary Public

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

M.R. Mikkilineni, General partner
Plaintiff - Appellant

v. NO: 96-20471
(D.C NO: CA-H-94-3552)

City of Houston, et. al.
Defendants-Appellees

APPELLANT'S RESPONSE TO CITY-APPELLEES MOTION TO DISMISS

AND NOW, comes M.R. Mikkilineni, pro-se appellant with a request to this Honorable Court to allow to file appellant's brief/record excerpts out of time and in excess pages and state as follows:

1. City-Appellees motion to dismiss and the Court's letter of 12/13/96 are received to Appellant in the mail today, 12/19/96.

2. M.R. Mikkilineni's brief/record excerpts in this matter were due to be filed on or about 12/2/1996; and in fact they were submitted to the Court by FedExp on 12/9/96 at about 9 pm. and copies were sent to the Appellees by Exp. mail on 12/10/96 because the post office was closed at 9 pm on 12/9/96.

2. Appellant will send the second copy brief/record to the Appellees by US mail on or before 12/24/96 when additional copies come out of printing.

3. M.R. Mikkilineni worked on this as well as on a related case brief deligently for weeks, but it took more time than anticipated to frame the issues, list all the facts and make the argument such that it comes out presentable/understanding to the reviewer. These two case briefs were due in this Court around the same time period.

4. M.R. Mikkilineni, a pro-se appellant worked hard to do it timely and reduce the pages, but due to lack of expertise/skill in framing complex issues, such as in this matter, he could not do it any better within the time allowed especially because of two related cases in a short time span. Therefore, appellant requests this Honorable Court to excuse out of time filing and allow excess pages to file. The Appellees are not prejudiced in anyway because of this; infact they are in an advantageous position with additional time to prepare their brief.

Respectfully submitted,

M.R. Mikkilineni, PE
PO Box 699, Ingomar, PA 15127 12/19/96

In the
UNITED STATES
COURT OF APPEALS
for the
FIFTH CIRCUIT

Cause Number 96-20471

M.R. MIKKILINENI, General Partner of Talasila,
Plaintiff/Appellant,
v.
CITY OF HOUSTON, et al.,
Defendants.

CITY OF HOUSTON; JUAN PADRON; HAROLD DARK; JOHN LAWSON; ROBIN HORNING; DENIS LLOYD; RUSSELL MAI; PHILIP BARNARD; GARY ORADAT,
Defendants/Appellees

Appeal taken from the United States District Court
for the Southern District of Texas, Cause Number H-CA-94-3552

MOTION TO STRIKE APPELLANT'S BRIEF and to DISMISS APPEAL by CITY OF HOUSTON, GARY ORADAT, RUSSELL MAI, and PHILIP BARNARD

ANDREA CHAN
Assistant City Attorney
P.O. Box 1562
Houston, Texas 77251
Attorney for Appellees, City of Houston,
Gary Oradat, Russell Mai, Denis Lloyd, and Philip Barnard

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal.

1. M.R. MIKKILINENI, plaintiff/appellant
2. CITY OF HOUSTON, defendant/appellee
3. JUAN PADRON, defendant/appellee
4. HAROLD DARK, defendant/appellee
5. JOHN LAWSON, defendant/appellee
6. ROBIN HORNING, defendant/appellee
7. DENIS LLOYD, defendant/appellee
8. RUSSELL MAI, defendant/appellee
9. PHILIP BARNARD, defendant/appellee
10. GARY ORADAT, defendant/appellee
11. Andrea Chan, Attorney for Houston, Lloyd, Mai, Barnard, and Oradat
12. Eleanor Robinson-Gaither, attorney for Padron, Dark, Lawson and Horning

SD

Andrea Chan

Background

Plaintiff, M.R. Mikkilineni, filed his notice of appeal in the case styled *Mikkilineni v. City of Houston*, in the United States District Court for the Southern District of Texas. This appeal was docketed as Appeal No. 96-20471.

On September 2, 1996, Mr. Mikkilineni moved to extend the deadline to file his brief until November 30, 1996, in Appeal Number 96-20471. On September 23, 1996, this Court extended the deadline until November 30, 1996, specifically stating that no further extension would be granted.

On December 10, 1996, Mr. Mikkilineni sent appellees one copy of his brief and one copy of his record excerpts by Express U.S. Mail although his transmittal letter indicates he sent the brief and record excerpts to this Court on December 9, 1996. See Exhibit A and B. in his transmittal letter, Mr. Mikkilineni requests this Court "to excuse the delay of one week and permit to file this brief, because it took more time than anticipated for plaintiff to put it together due to lack of experience with a complicated case as this one." See Exhibit B.

Reasons to Strike and Dismiss

1. Appellant previously requested and was granted an extension of time of seventy-four days to file his brief. This Court specifically stated in its order "no further extensions will be granted." By requesting an additional extension of time, Mr. Mikkilineni is violating the express order of this Court.

2. Appellant's second request for an extension of time does not comply with the Federal Rules of Appellate Procedure. An enlargement of time file a brief may be granted upon motion for good cause shown. FED. R. APP. P. 26 (b). Mr. Mikkilineni has failed to show any cause for the delay.

3. Appellees are entitled to move to dismiss the appeal because appellant has failed to file a brief within the time to which the briefing deadline was extended. FED. R. APP. P. 31 (c).

4. Appellant's brief does not comply with rule 28 of the Federal Rules of Appellate Procedure. Local Rule 28.1 provides that

principal briefs shall not exceed 50 pages and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, etc. regardless of the form of printing or reproduction used. Motions for leave to file briefs in excess of the page requirements of this rule must be filed at least 10 days in advance of the due date of the brief.

Mr. Mikkilineni did not request permission to file a brief in excess of the page limits, much less request permission in a timely manner. Further, Mr. Mikkilineni did include the sections "Course of Proceedings and Disposition in Court Below" or "Statement of Facts" as required by Local Rule 28.3.

5. Mr. Mikkilineni has failed to serve his brief on appellees, City of Houston, Gary Oradat, Russell Mai, Denis Lloyd, and Philip Barnard, as required by FED. R. APP. P. 31 (b). Appellant only served appellees with one copy of his brief, although rule 31 (b) provides that two copies shall be served on counsel for each party separately represented.

Wherefore, appellees, City of Houston, Gary Oradat, Russell Mai, Denis Lloyd, and Philip Barnard, pray that this Court strike the brief of appellant, M.R. Mikkilineni and Talasila and dismiss the appeal.

Respectfully submitted,

ANDREA CHAN
Assistant City Attorney
P.O. Box 1562
Houston, Texas 77251
713/247-1511
713/247-1017 (FAX)
Attorney for Appellees, City of Houston, Gary Oradat, Russell Mai, Denis Lloyd, and Philip Barnard

Of Counsel:
GENE L. LOCKE, City Attorney
CITY OF HOUSTON LEGAL DEPARTMENT

CERTIFICATE OF SERVICE

I certify that a copy of this motion to dismiss was served upon all counsel of record by first class mail in compliance with the Federal Rules of Appellate Procedure, this the eleventh day of December, 1996.

M.R. Mikkilineni
P.O. Box 699
Ingomar, PA 15127
CCM RRR P 959 927 556

Eleanor Robinson-Gaither
U.S. Attorney's Office
910 Travis, Suite 1500
P.O. Box 61129
Houston, Texas 77208-1129

SD

Andrea Chan

EXPRESS MAIL

POST OFFICE TO ADDRESSEE

EH52092642905

DEFENDANT'S
EXHIBIT A

United States Court of Appeals
Fifth Circuit
Office of the Clerk
600 Camp St.
New Orleans, LA 70130

12/9/1996
by Exp. Mail

Atten: Nancy Dolly

Ref: # 96-20471 Mikkilineni v. City of Houston et. al.
94-3552 (USDC)

Honorable Court:

Plaintiff's brief in this action was to be filed by 12/2/1996. Pleased to file 7 copies of the brief and 4 copies of record excerpts by Exp mail today, 12/9/96.

Plaintiff requests this Honorable Court to excuse the delay of one week and permit to file this brief, because it took more time than anticipated for plaintiff to put it together due to lack of experience with a complicated case as this one.

Plaintiff also requests this Honorable Court to allow more than 50 pages in the brief and more than 40 pages for the optional portion of record excerpts. Plaintiff tried to reduce the pages, but could not do it for lack of skill and also time for re-writting the brief.

Plaintiff tried to obtain attorney representation, but could not at this time because of lack of money and lack of enough time. However, plaintiff should be able to secure legal representation if this Honorable Court would reverse the ruling of the District Court.

The Original Court Record- 12 volumes were sent by UPS on 12/5/96 and a copy of delivery receipt is attached.

Respectfully,

SD

M.R. Mikkilineni, PE
PO Box 699
Ingomar, PA 15127

cc: All defendants

DEFENDANT'S
EXHIBIT B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

M.R. Mikkilineni, General partner
Plaintiff - Appellant

v NO: 96-20471
(D.C NO: CA-H-94-3552)

City of Houston, et. al.
Defendants-Appellees

APPELLANT'S MOTION TO FILE OUT OF TIME

AND NOW, comes M.R. Mikkilineni, pro-se appellant with a request to this Honorable Court to allow to file appellant's brief/record excerpts out of time and state as follows:

1. M.R. Mikkilineni's brief/record excerpts in this matter were due to be filed on or about 12/2/1996.

2. M.R. Mikkilineni worked on this brief deligently for weeks, but it took more time than anticipated to frame the issues, list all the facts and make the argument such that it comes out presentable/understanding to the reviewer; it could have been done better if there was couple of weeks of more time available.

3. The brief/record excerpts were submitted to the Court on 12/9/1996 by Exp. mail. M.R. Mikkilineni requests this Honorable Court to excuse the delay of one week and allow to file appellant's brief/record excerpts.

Respectfully submitted,

SD

M.R. Mikkilineni, PE
PO Box 699, Ingomar, PA 15127

I certify that a true and correct copy of this motion is sent by US mail on 12/18/96 to the following:

1. Andrea Chan, Esq.
2. Eleanor Robinson-Gaither, Esq.

M.R. Mikkilineni

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

M.R. Mikkilineni, General partner
Plaintiff - Appellant

v. NO: 96-20471
(D.C. NO: CA-H-94-3552)

City of Houston, et. al.
Defendants-Appellees

APPELLANT'S MOTION TO FILE IN EXCESS OF PAGES

AND NOW, comes M.R. Mikkilineni, pro-se appellant with a request to this Honorable Court to allow to file appellant's brief/record excerpts with excess of pages and state as follows:

1. M.R. Mikkilineni's brief/record excerpts in this matter was submitted to the Court on or about 12/9/1996 by Exp. mail. The number of pages are 68 instead of 50 in the brief, and the number of pages are about 300 instead of 40 in the optional portion of the record excerpts.

2. M.R. Mikkilineni, a pro-se appellant worked hard to reduce the pages, but due to lack of expertise/skill in framing a complex case, such as this, he could not do it any better within the time allowed.

3. M.R. Mikkilineni requests this Honorable Court to excuse the use of excess pages and allow to file appellant's brief/record excerpts.

Respectfully submitted,

SD

M.R. Mikkilineni, PE
PO Box 699, Ingomar, PA 15127

I certify that a true and correct copy of this motion is sent by US mail on 12/18/96 to the following:

1. Andrea Chan, Esq.
2. Eleanor Robinson-Gaither, Esq.

M.R. Mikkilineni

UNITED STATES COURT OF APPEALS
Fifth Circuit
Office Of The Clerk

CHARLES R. FULBRUGE III
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

December 12, 1996

Mr. M. R. Mikkilineni
2499 Elkridge Drive
Wexford, PA 15090

No. 96-20471 Mikkilineni v. The City of Houston
USDC No. CA-H-94-3552

Your brief and record excerpts have been received but not filed, since motions to file out of time and to file in excess of pages are required. These motions should be received within 10 days.

Sincerely,

CHARLES R. FULBRUGE III, Clerk
SD

By: _____
Carol LeSage, Deputy Clerk

cc: Ms. Michel D. Siemer
Ms. Andrea Chan
Ms. Eleanor Ann Robinson-Gaither

BR-5

United States Court of Appeals
Fifth Circuit
Office of the Clerk
600 Camp St.
New Orleans, LA 70130

12/9/1996
by Exp. Mail

Atten: Nancy Dolly

Ref: # 96-20471 Mikkilineni v. City of Houston et. al.
94-3552 (USDC)

Honorable Court:

Plaintiff's brief in this action was to be filed by 12/2/1996. Pleased to file 7 copies of the brief and 4 copies of record excerpts by Exp mail today, 12/9/96.

Plaintiff requests this Honorable Court to excuse the delay of one week and permit to file this brief, because it took more time than anticipated for plaintiff to put it together due to lack of experience with a complicated case as this one.

Plaintiff also requests this Honorable Court to allow more than 50 pages in the brief and more than 40 pages for the optional portion of record excerpts. Plaintiff tried to reduce the pages, but could not do it for lack of skill and also time for re-writting the brief.

Plaintiff tried to obtain attorney representation, but could not at this time because of lack of money and lack of enough time. However, plaintiff should be able to secure legal representation if this Honorable Court would reverse the ruling of the District Court.

The Original Court Record- 12 volumes were sent by UPS on 12/5/96 and a copy of delivery receipt is attached.

Respectfully,

M.R. Mikkilineni, PE
PO Box 699
Ingomar, PA 15127

cc: All defendants

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-20471

Filed
Nov. 5, 1996

M.R. MIKKILINENI, General Partner of Talasila,
Plaintiff/Appellant,

v.

CITY OF HOUSTON, et al.,
Defendants.

THE CITY OF HOUSTON; JUAN PADRON; HAROLD DARK; JOHN LAWSON; ROBIN HORNING; DENIS LLOYD; RUSSELL MAI; PHILIP BARNARD; GARY ORADAT
Defendants - Appellees

- -

Appeal from the United States Court for the
Southern District of Texas, Houston

- -

No. 96-60588

TALASILA, INC

Petitioner

v.

ROBERT B. REICH, Secretary of labor

Respondent

Petition for Review of an Order of the
Occupational Safety & Health Rev. Comm.

Before JONES, DeMOSS and PARKER, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the appellant, M.R. Mikkilineni, to consolidate number 95-20471 with case number 95-60588 is DENIED.

IT IS FURTHER ORDERED that the motion of appellees, The City of Houston, Denis Lloyd, Russell Mai, Philip Barnard and Gary Oradat, to consolidate and dismiss the appeals is DENIED

These appeals will proceed separately.

SD

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-20471

Filed
Sep. 23, 1996

M.R. MIKKILINENI, General Partner of Talasila
Plaintiff - Appellant

v.

THE CITY OF HOUSTON, Et Al.,
Defendants

THE CITY OF HOUSTON; JUAN PADRON; HAROLD DARK; JOHN LAWSON; ROBIN HORNING; DENIS LLOYD; RUSSELL MAI; PHILIP BARNARD; GARY ORADAT
Defendants - Appellees

- -

Appeal from the United States District Court for the
Southern District of Texas, Houston

- -

O R D E R :

IT IS ORDERED that appellant's unopposed motion for an extension of 74 days, or, to and including November 30, 1996 to file their brief is GRANTED, but no further extensions will be GRANTED.

SD

HAROLD R. DeMOSS, JR.
UNITED STATES CIRCUIT JUDGE

M.R. Mikkilineni, PE
PO Box 699
Ingomar, PA 15127
412 935 9752

9/19/96

US Court of Appeals
5th Circuit
600 Camp St.
New Orleans, LA 70130

Atten: Nancy Dolly/T.J. Thorne

Ref: # 96-20471- Mikkilineni v. City of Houston
96-60588- Talasila Inc. v. Secretary Reich

Honorable Court:

Thank you for letters dated 9/4/96 from Thorne and Dolly regarding the two related actions.

I sent a check for $100 towards the court fee.

I received 12 folders of records from Dolly a few days ago; and these folders will be returned along with my brief. Would you be kind to send me a copy of sample brief and apendices on a similar case if available.

I request that these two appeals, with parties and the subject matter being the same, be reviewed by one panel of Judges of this Honorable Court in the interest of Justice and economy of the proceedings.

Respectfully,

M.R. Mikkilineni, PE

I certify that a true and correct copy is sent by US mail to the following on 9/19/96.

Andrea Chan/Siemer- City of Houston
Eleanor Robinson-Gaither- US Attorney
Thomas Williamson Jr.- USDOL

M.R. Mikkilineni

M.R. MIKKILINENI, PE
PO BOX 699
Ingomar, PA 15127
412 935 9752

9/2/96
by EXP. MAIL

US Court of Appeals
5th Circuit
600 Camp St.
New Orleans, LA 70130

RECEIVED
Sep. 4, 1996

Atten: Eileen Boudoin

Ref: #96-20471 - Mikkilineni v. City of Houston

Honorable Court:

Reference is made to your letter of 8/8/96 regarding whether all of the claims as to all of the parties have been disposed of and whether the judgment entered is appealable in the absence of certification by the district court. The answer to this is- YES.

Reference is made to Nancy Dolly's letter of 8/8/96, and I as a pro se litigant request a briefing checklist and the RECORD to prepare my brief. Based on the briefing notice, my brief is due on or before 9/20/96. However, on a related matter OSHRC entered a final order on 7/24/96 which must be appealed to the 5th Circuit within 60 days. While I keep working on these briefs, I am also looking for an attorney to represent me in these matters. For this reason, I require additional time to prepare and file my brief. I request the court to extend the due date for my brief until 11/30/96.

FILED
SEP. 4, 1996

I hereby appeal the OSHRC final order for review by this Honorable Court, and the following relevant record is attached:

1. OSHRC's decision and order of 2/21/96 removal of ALJ and remand to a new ALJ upon Mikkilineni's appeal

2. OSHRC's order of 2/26/96 remand/reassign to new ALJ

3. ALJ's order of 3/15/96 allowing the Secretary to amend the citations originally issued in early 1993, and change the caption of the complaint filed in 1993-94 from Talasila Inc., a corporate party to Talasila, a partnership.

4. Default decision and order of ALJ against Talasila on 5/14/96

5. Mikkilineni's appeal to OSHRC for review dated 6/17/96

6. OSHRC final order of 7/25/96

7. OSHRC's order of 8/5/96 allowing the Secretary to amend the citations/complaint again, one more time, to include the individuals- M.R. Mikkilineni and Rupa Mikkilineni

8. Mikkilineni's notice of appeal of 8/30/96 on OSHRC final order.

Factual background:

Talasila, a partnership with M.R. Mikkilineni as the general partner, was the contractor on a pump station project for the City of Houston. The City engineer, who admitted total ignorance related to trench safety/soil stability or OSHA safety standards, complained to OSHA several times during 1993 against Talasila for the violation of safety standards.

During Feb./March and May/June 1993, the OSHA Inspectors appeared unannounced and conducted wall to wall inspections of Talasila's work facility several times and issued citations amounting to over $150,000 in the name of Talasila Inc., a corporate party, knowing that it was the wrong party. These citations were never properly served upon Talasila, the contractor or M.R. Mikkilineni, the general partner or Rupa Mikkilineni, who was attending a law school at that time. There were no safety violations or incidents at this site at any time and all work was completed under the direction of a Registered professional engineer, who was familiar with safety standards.

In 1993-94, the Secretary filed complaints against Talasila Inc,. refused to issue the citations and file complaint on the name of Talasila, the contractor, even though Mikkilineni repeatedly reported the facts to OSHA and OSHRC.

In Oct. 1994, OSHRC's ALJ conducted a hearing in Houston, TX after refusing to allow Talasila Inc. to discover relevant facts/documents from OSHA. At this hearing, the ALJ did not allow Talasila Inc. to fully cross-examine OSHA's witnesses, and after 2.5 days of testimony from OSHA witnesses the ALJ removed Talasila Inc.'s representative from participating in the hearing.

On 2/21/96, OSHRC Commissioners removed the ALJ and remanded/reassigned the case to a new ALJ. However, the Commissioners did not rule on Talasila Inc.'s discovery requests. According to Commissioner Weisberg, "it would be premature to determine whether the ALJ properly handled discovery until a decision is rendered on the merits". Whereas Commissioner Montoya believed that "judicial economy would best be served by resolving the discovery issue now and discovery issues are central to the case.."

Inspite of Commissioner Montoya's wise observations on

discovery issues, the new ALJ decided to allow only two of the OSHA witnesses to be cross-examined at the hearing; and the hearing was set for 5/14/96 in Houston, TX, without allowing discovery of relevant facts/documents. The ALJ also granted Secretary's motion to amend the citations/complaint replacing Talasila Inc. with Talasila as the party, after a lapse of nearly 2.5 years.

Talasila, the new party to this action could not secure legal counsel due to lack of finances. Mikkilineni, as the general partner once, promptly motioned the ALJ to allow discovery and to delay the hearing set for 5/14/96 giving additional time to prepare. The ALJ denied Mikkilineni's requests and went ahead with the hearing in Houston on 5/14/96 and entered a DEFAULT judgment against Talasila, who was not properly served with citations/complaint at any time. The ALJ entered the default judgment without reviewing the evidence on the record.

The OSHRC Commissioner's let ALJ's decision as final, and subsequently granted Secretary's motion to amend citations/complaint in the name of individuals, M.R. Mikkilineni, father, and Rupa Mikkilineni, daughter who recently graduated from Law School.

The issues to be reviewed by this Honorable Court:

1. Whether or not Talasila the contractor and the proper party to be cited for the alleged OSHA violations?

2. Whether the Secretary willfully cited/filed complaint on Talasila Inc., a wrong party?

3. Whether the Secretary affectuated proper service of citations/ complaint on Talasila, the partnership or the individuals M.R. and Rupa?

4. Whether the ALJ/OSHRC abused its discretion in allowing the Secretary to amend the citations/complaint at will after a lapse of nearly 3 years from the date of original filing?

5. Whether the ALJ/OSHRC abused its discretion by ordering a limited hearing on 5/14/96 after denying discovery request, and entering a default judgment against Talasila inspite of the clear evidence on the record that OSHA witnesses PURJURED under oath.

A brief will be filed on these issues for review and ruling by this Honorable Court. Please file this appeal for review and advise on the amount of court filing fee.

Respectfully,

M.R. Mikkilineni, PE
PO Box 699
Ingomar, PA 15127
412 935 9752

cc: Siemer
Robinson-Gaither
Mick

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

M.R. Mikkilineni
Plaintiff

v.

No.: 94-3552
Hon. Judge Werlein, Jr.

City of Houston et. al.
Defendants

PLAINTIFF'S NOTICE OF APPEAL

Plaintiff M.R. Mikkilineni hereby gives a notice to appeal to the 5th Circuit on the final (summary) judgment entered by this court on 4/12/96 in this matter.

A check for $105 is attached towards appeal fee.

On or about 4/30/96 plaintiff made several phone calls to the District Court, Clerk's office and finally received instructions at phone #713 250 5529/5496 regarding this notice of appeal and the check.

Attorney McKay no longer represents plaintiff due to financial conditions, and please mail/Fax all court documents related to this action to the following address/phone.

M.R. Mikkilineni, PE
PO Box 699
Ingomar, PA 15127
412 935 9752

FILED
MAY 10, 1996

Respectfully submitted,

M.R. Mikkilineni

I certify that a true and correct copy is sent by US mail to the following on 5/4/96:

1. Mike Siemer
2. Eleanor Robinson-Gaither

M.R. Mikkilineni

Supreme Court, U.S.
FILED
JUN 27 1997
CLERK

No. 96-1891

In The

Supreme Court of the United States

October Term, 1996

M.R. MIKKILINENI, General Partner of Talasila,

Petitioner,

v.

CITY OF HOUSTON, TEXAS, DENIS LLOYD, RUSSELL MAI, PHILIP BARNARD, GARY ORADAT, UNITED STATES DEPARTMENT OF LABOR, JUAN PADRON, HAROLD DARK, JOHN LAWSON, and ROBIN HORNING,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF CITY OF HOUSTON, DENIS LLOYD, RUSSELL MAI, PHILIP BARNARD, and GARY ORADAT

ANDREA CHAN
Assistant City Attorney
Counsel of Record
P.O. Box 1562
Houston, Texas 77251
713/247-1511
713/247-1017 (FAX)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

24 pp

QUESTION PRESENTED

Did the Fifth Circuit Court of Appeals deny petitioner's right to procedural due process of law when it granted Respondents' Motion to Dismiss his appeal because Petitioner, an uncounseled litigant, filed his *pro se* brief nine (9) days out of time?

LIST OF ALL PARTIES TO THE PROCEEDINGS

M.R. Mikkilineni – Petitioner/plaintiff

City of Houston – Respondent/defendant

Juan Padron – Respondent/defendant

Harold Dark – Respondent/defendant

John Lawson – Respondent/defendant

Robin Horning – Respondent/defendant

Denis Lloyd – Respondent/defendant

Russell Mai – Respondent/defendant

Philip Barnard – Respondent/defendant

Gary Oradat – Respondent/defendant

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents request that this Court deny the petition for a writ of certiorari seeking review of an opinion of the United States Court of Appeals for the Fifth Circuit, and present in support of their request:

STATEMENT OF THE CASE

Petitioner, M.R. Mikkilineni, originally attempted to file this lawsuit both *in forma pauperis* and *pro se* in October 1994. However, the district court denied his motion to proceed *in forma pauperis*. Mr. Mikkilineni based his action on an alleged violation of his due process rights as guaranteed under the Fourteenth Amendment to the United States Constitution and for breach of contract.

After discovery was conducted, respondents, City of Houston, Denis Lloyd, Russell Mai, Philip Barnard, and Gary Oradat, defendants and appellees below (collectively "City defendants"), filed a motion for summary judgment. At the time of the summary judgment, Mr. Mikkilineni was represented by counsel. The district court found that Mr. Mikkilineni's lack of material summary judgment evidence and his vague, conclusory, and incompetent evidence did not raise a genuine issue of material fact to show that the City defendants deprived him of a protected life, liberty, or property interest. Consequently, the district court granted summary judgment in favor of the City defendants on Mr. Mikkilineni's federal claims and remanded his state law claims for breach of contract against the City of Houston to state court.

Mr. Mikkilineni then sought to appeal the district court's judgment.

Before Mr. Mikkilineni's brief was due to be filed in the court of appeals, he requested an extension of time to file his brief. The City defendants did not oppose that motion, and the court of appeals granted an extension of seventy-four (74) days, but warned that no further extensions would be granted. On or about December 9, 1996, Mr. Mikkilineni sent the court of appeals a brief and record excerpts which exceeded the court of appeals' page limits for filing. The court of appeals did not file the brief and record excerpts, but marked them "received" on December 12, 1996. On December 13, 1996, the City defendants moved to strike Mr. Mikkilineni's brief and to dismiss his appeal. Mr. Mikkilineni responded by filing a motion for extension of time and to file a brief and record excerpts in excess of the page limits. The court of appeals denied Mr. Mikkilineni's motions and granted the City defendants' motion to dismiss. Mr. Mikkilineni now claims his right to due process as guaranteed by the Fifth Amendment to the United States Constitution was violated.

REASONS FOR DENYING THE WRIT

This case does not merit review by this Honorable Court. Petitioner has not established any of the considerations set forth in this Court's Rule 10. The decision rendered by the Court of Appeals for the Fifth Circuit does not conflict with any other decision of another Court of Appeals or of this Court. This case presents no important legal issue that this Court has not decided, but should decide. The actions of the lower courts were not of

such a nature as to call for an exercise of this Court's power of supervision.

ARGUMENT

The Court of Appeals for the Fifth Circuit below properly denied Mr. Mikkilineni's motions relating to his brief and record excerpts on January 28, 1997, and properly denied Mr. Mikkilineni's request for reconsideration of its order. The court of appeals also properly granted the motion to dismiss the appeal filed by respondents, City of Houston, Gary Oradat, Russell Mai, Denis Lloyd, and Philip Barnard. Contrary to Mr. Mikkilineni's belief, the Court of Appeals afforded him due process.

Mr. Mikkilineni suggests that the court of appeals treated him in a manner "inconsistent with its own basic sense of due process fairness in dealing with uncounseled appellants as is guaranteed by the Due Process Clause of the Fifth Amendment to the United States Constitution." Petition for a Writ of Certiorari at 5. However, the Court of Appeals did afford Mr. Mikkilineni due process. Mr. Mikkilineni filed a motion for extension of time to file his brief and record excerpts and a motion to file oversized brief and record excerpts. The City defendants, who had filed a motion to dismiss, responded to his motions. Mr. Mikkilineni then filed his reply to the City defendants' motions.

Mr. Mikkilineni would like this Court to believe that the Court of Appeals did not extend Mr. Mikkilineni any grace because it denied his motions. However, Mr. Mikkilineni ignores the fact that the court of appeals did grant his motion for extension to file his brief until

November 30, 1996, but also ordered that no further extension would be granted. Thus, his case is distinguishable from the cases he cites in support of his position.

I. Due process only requires an opportunity to be heard.

Due process requires that a litigant be afforded a meaningful opportunity to assert his claim. Basically, due process requires that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985). The denial of an actual, aural hearing does not violate due process rights where there are no issues which a hearing could illuminate. *See Travelers Ins. Co. v. St. Jude Hosp.*, 38 F.3d 1414, 1416 (5th Cir. 1994). All that due process requires in a civil case is proper notice and service of process. *New York Life Ins. Co. v. Brown*, 84 F.3d 137, 143 (5th Cir. 1996).

The court of appeals gave Mr. Mikkilineni the opportunity to be heard before it ruled on each of the motions of which he now complains. Indeed, Mr. Mikkilineni responded to each of these motions. On December 13, 1996, the City defendants filed their Motion to Strike Appellant's Brief and to Dismiss Appeal. On the same day, the court of appeals gave Mr. Mikkilineni notice that the matter would be presented for ruling without oral argument on December 20, 1996. *See* Appendix C. Mr. Mikkilineni had notice of the City defendants' motion and notice of when the motion would be presented for ruling. Mr. Mikkilineni responded to the City defendants'

motion and further filed his Motion for Leave to File Brief/Record Excerpts Out of Time, to File Oversize Brief of 68 Pages/Record Excerpts of 300 Pages. The court of appeals gave all parties notice that Mr. Mikkilineni's motion would be presented for ruling without oral argument on December 27, 1996. *See* Appendix D. Clearly, because the court of appeals gave Mr. Mikkilineni notice of the date on which the motions would be presented, Mr. Mikkilineni had ample opportunity to file responses so as to be heard. The Court of Appeals for the Fifth Circuit did not deny Mr. Mikkilineni due process by denying his motions and by granting the City defendants' motion to dismiss his appeal because Mr. Mikkilineni had the opportunity to be heard and filed responses so as to be heard.

II. Court of Appeals properly denied petitioner's motions and dismissed his appeal.

The Court of Appeals for the Fifth Circuit plainly sets forth the procedure by which it considers motions regarding the filing of briefs, including the brief's length and filing due date. *See* 5TH CIR. R. 26.2 and 28. Federal Rule of Appellate Procedure 31 (c) allows appellees to move for dismissal of an appeal where the appellant's brief is not timely filed. The court of appeals also provides guidelines whereby it may dismiss an appeal for failure to prosecute. *See* 5TH CIR. R. 42.

Despite the court of appeals' admonition that it would grant Mr. Mikkilineni no further extensions of time to file his brief, Mr. Mikkilineni attempted to file his brief nine (9) days after his new filing deadline. *See* Petitioner's Appendix 14a. Upon the court of appeals'

notice to him on December 12, 1996, Mr. Mikkilineni filed a second motion for extension of time. However, his motion did not comply with Rule 26 (b) of the Federal Rules of Appellate Procedure. Mr. Mikkilineni did not show good cause for his delay in filing his brief. Because Mr. Mikkilineni did not file his brief within his briefing deadline, the City defendants were entitled to move to dismiss his appeal. FED. R. APP. P. 31 (c).

Mr. Mikkilineni also moved for leave to file a brief in excess of the page limits and record excerpts in excess of the page limits. However, Mr. Mikkilineni did not comply with the court of appeals' local rules which require that when a party wishes to file a brief in excess of the fifty page limit, he must move for leave at least ten days in advance of the due date of the brief. 5TH CIR. R. 28.1. A violation of the rule limiting the length of the brief may result in a *sua sponte* striking of the briefs. *Neeley v. Bankers Trust Co.*, 757 F.2d 621, 634 n.18 (5th Cir. 1985). Although he mentions his brief's length in his letter to the court of appeals, Mr. Mikkilineni did not move for permission to file a brief in excess of the page limits until after some twenty days after his brief's due date, more than thirty days after the deadline to file such a motion.

The court of appeals clearly set forth the requirements for motions filed before it in its Local Rules, thereby giving Mr. Mikkilineni notice of its requirements. Mr. Mikkilineni did not comply with the requirements of the court of appeals. The court of appeals properly denied his motion for extension of time to file his brief and for leave to file a brief and record excerpts in excess pages and properly granted the City defendants' motion to dismiss.

III. Petitioner has not shown the court of appeals' decision conflicts with other decisions.

None of the cases upon which Mr. Mikkilineni relies to support his argument addresses the situation in which the appellant files a brief in excess of page limits. Some of the cases to which Mr. Mikkilineni cites do liberally construe the *pro se* appellant's brief. However, these cases do not conflict with the court of appeals' decision to deny him leave to file his brief and record excerpts or to dismiss his appeal.

Mr. Mikkilineni first refers to a case in which the court of appeals declined to dismiss a *pro se* appellant's appeal in a breach of contract action because, when liberally construed, the brief contained an assertion or trial court error. *Abdul-Alim Amin v. Universal Life Ins. Co.*, 706 F.2d 638, 640 (5th Cir. 1983). The issue before the court in that case was whether the statute of limitations barred appellant's cause of action. The court of appeals did not consider whether the appellant had timely filed his appellant's brief. Rather, the court of appeals decided that the appellant there articulated appealable error if his brief were liberally construed. The issue before this Court is not whether Mr. Mikkilineni articulated appealable error or whether his claims were time barred, but whether the court of appeals afforded him due process.

Mr. Mikkilineni referred to another case in which the court of appeals considered whether a *pro se* appellant waived his claim that his suit was not time barred because it lacked an argument. *Price v. Digital Equip. Co.*, 846 F.2d 1026, 1028 (5th Cir. 1988). The court of appeals liberally construed and reviewed that appellant's claim despite the inadequate brief which failed to brief appellant's argument. Again, the court of appeals did not

consider the timeliness of the filing of the deficient brief. The City defendants do not claim that Mr. Mikkilineni's brief was inadequate because he failed to brief issues, but rather, that he filed his excessively long brief and record excerpts late.

Mr. Mikkilineni also relies upon cases from other circuits such as *McCottrell v. E.E.O.C.*, 726 F.2d 350 (7th Cir. 1984). Although the Court of Appeals for the Seventh Circuit refused to dismiss that appeal because of a "woefully inadequate" brief which "sets forth a discernible, albeit unsupported, argument," the court warned that "*pro se* litigants should anticipate that [the Court of Appeals for the Seventh Circuit] may dismiss an appeal where the brief submitted contains no identifiable argument." *McCottrell*, 726 F.2d at 351. Again, nothing in the City defendants' motion to dismiss suggested that Mr. Mikkilineni's brief contained an unsupported or undiscernible argument, so *McCottrell* does not control.

Relying on *Balistreri v. Pacifica Police Dep't*, 855 F.2d 1421, 1424 (9th Cir. 1988), Mr. Mikkilineni argues that *pro se* litigants should not lose their right to a hearing on the merits of their claims due to ignorance of technical procedural requirements. Ms. Balistreri failed to follow that court of appeals' formal requirements for brief-writing, but because she articulated the challenge of the district court's ruling, that court of appeals considered her arguments. Although necessity of moving to file an excessively long brief may amount to a technical procedural requirement, Mr. Mikkilineni cannot claim ignorance of the court of appeals' requirements that the length of a principal brief not exceed fifty pages and that the length of the optional contents of record excerpts not exceed forty pages. Mr. Mikkilineni knew when he filed his brief

and record excerpts on December 9, 1996, that they were too long and late as evidenced by his cover letter. He also knew then that to file a brief and record excerpts out of time required a motion for extension of time because the court of appeals had advised him on September 4, 1996, that his first request to extend time to file his brief would be presented to the court for a ruling as a motion. Thus, Mr. Mikkilineni cannot claim ignorance of the court of appeals' procedural requirements with regard to his second motion for extension of time and the length of his brief and record excerpts.

Finally, Mr. Mikkilineni cites *Cramer v. Phoenix Mut. Life Ins. Co.*, 91 F.2d 141 (8th Cir. 1937). The Court of Appeals for the Eighth Circuit excused "a fully and satisfactorily explained and . . . purely accidental" delay in the filing of appellants' brief. *Cramer*, 91 F.2d at 144. The court of appeals, however, did not give further guidance as to what constituted an excused delay.

Contrary to Mr. Mikkilineni's representations to this Court, Mr. Mikkilineni's brief and record excerpts were not filed before the City defendants filed their motion to dismiss.[1] On December 12, 1996, the court of appeals informed Mr. Mikkilineni that his "brief and record excerpts have been received but not filed, since motions to file out of time and to file in excess of pages are required." Petitioner's Appendix 11a. Clearly, Mr. Mikkilineni's brief and record excerpts could not have been filed because the court of appeals merely "received" the

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[1] "Although he filed his lengthy brief nine days out of time, it was filed prior to the date when appellee's filed their motion to dismiss." Petitioner's Petition for a Writ of Certiorari at 6.

documents. *See* Appendix B. The City defendants filed their Motion to Strike Appellant's Brief and Dismiss Appeal on December 13, 1996, before Mr. Mikkilineni moved to file his late and lengthy brief and record excerpts. *See* Appendix C. Mr. Mikkilineni's only explanation for his delay in filing his brief was "it took more time than anticipated to frame the issues, list all the facts and make the argument such that it comes out presentable/ understanding to the reviewer; it could have been one better if there was a couple of weeks of more time available."

Unlike the appellant in *Cramer*, Mr. Mikkilineni did not file his brief before the City defendants filed their motion to dismiss. His delay in submitting his brief was not satisfactorily explained nor was it the result of any accident. He also attributed the length of his brief and record excerpts to time restraints, but gave no other reason for their excessive length. The court of appeals' action does not conflict with the holding in *Cramer*.

None of the cases relied upon by Mr. Mikkilineni show that the court of appeals acted in a manner which conflicts with other decisions by that court or any other court.

CONCLUSION

The Court of Appeals for the Fifth Circuit Court did not deny Mr. Mikkilineni due process of law by dismissing his appeal. The court of appeals afforded Mr. Mikkilineni due process before dismissing his appeal. Mr. Mikkilineni has not shown that the action of the court below warrants a review by this Court.

For all of the reasons set forth above, the petition for writ of certiorari should be denied.

Dated: June 27, 1997
Houston, Texas

Respectfully submitted,

ANDREA CHAN
Assistant City Attorney
(Counsel of Record)

P.O. Box 1562
Houston, Texas
713/247-1511
713/247-1017 (FAX)

Attorney for Respondents,City of Houston, Russell Mai, Denis Lloyd, Philip Barnard, and Gary Oradat

Of Counsel:

GENE L. LOCKE
City Attorney

CITY OF HOUSTON LEGAL DEPARTMENT
Members of the Texas Bar

APPENDIX A

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT
OFFICE OF THE CLERK

TEL. 504-589-6514
CHARLES R. FULBRUGE III 600 CAMP STREET
CLERK NEW ORLEANS, LA 70130

September 4, 1996

TO COUNSEL FOR APPELLEES

No. 96-20471 Mikkilineni v. The City of Houston USDC No. CA-H-94-3553

Regarding the case above, the following has been filed:

Motion filed by Appellant M R Mikkilineni to extend time to file appellants brief

This matter will be **presented** for ruling **without oral argument.** Any response must be filed by opposing counsel on or before September 11, 1996. Counsel will be notified by mail after the Court has ruled.

Sincerely,

CHARLES R. FULBRUGE III,
Clerk

By: /s/ Nancy Dolly
Nancy Dolly,
Deputy Clerk

cc: Mr M R Mikkilineni
Ms Michel D Siemer
Ms Andrea Chan
Ms Eleanor Ann Robinson-Gaither

P. S. to counsel filing pleadings: Unless the pleading is purely procedural and/or a certificate of interested persons has already been submitted, please send the certificate required by Local Rule 27.5 by the date above.

P P S To Mikkilinen: The question regarding jurisdiction should be addressed in your brief which is currently due September 17, 1996. Your petition for review (appeal) has been forwarded to the section in this office that handles agency appeals.

MOT-1

APPENDIX B

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT
OFFICE OF THE CLERK

TEL. 504-589-6514
CHARLES R. FULBRUGE III **600 CAMP STREET**
CLERK **NEW ORLEANS, LA 70130**

December 12, 1996

Mr M R Mikkilineni
2499 Elkridge Drive
Wexford, PA 15090

No. 96-20471 Mikkilineni v. The City of Houston
USDC No. CA-H-94-3552

Your brief and record excerpts have been received but not filed, since motions to file out of time and to file in excess of pages are required. These motions should be received within 10 days.

Sincerely,

CHARLES R. FULBRUGE III,
Clerk

By: /s/ Carol G. LeSage
Carol LeSage,
Deputy Clerk

cc: Ms Michel D Siemer
Ms Andrea Chan
Ms Eleanor Ann Robinson-Gaither

BR-5

APPENDIX C

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT
OFFICE OF THE CLERK

TEL. 504-589-6514
CHARLES R. FULBRUGE III 600 CAMP STREET
CLERK NEW ORLEANS, LA 70130

December 13, 1996

Mr M R Mikkilineni
2499 Elkridge Drive
Wexford, PA 15090

No. 96-20471 Mikkilineni v. The City of Houston
USDC No. CA-H-94-3552

Regarding the case above, the following has been filed:

Motion filed by Appellees, The City of Houston, Gary Oradat, Russell Mai, Denis Lloyd, and Philip Barnard to strike appellant's brief and dismiss appeal

This matter will be **presented** for ruling **without oral argument.** Any response must be filed by opposing counsel on or before 12/20/96. Counsel will be notified by mail after the court has ruled.

Sincerely,

CHARLES R. FULBRUGE III,
Clerk

By: /s/ Carol G. LeSage
Carol LeSage,
Deputy Clerk

cc: Ms Andrea Chan
Ms Eleanor Ann Robinson-Gaither

P.S. to counsel filing pleadings: Unless the pleading is purely procedural and/or a certificate of interested persons has already been submitted, please send the certificate required by Local Rule 27.5 by the date above.

MOT-1

APPENDIX D

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT
OFFICE OF THE CLERK

TEL. 504-589-6514
CHARLES R. FULBRUGE III 600 CAMP STREET
CLERK NEW ORLEANS, LA 70130

December 20, 1996

Ms Andrea Chan
Office of the City Attorney
for the City of Houston
900 Bagby
4th Floor
Houston, TX 77002

Ms Eleanor Ann Robinson-Gaither
US Attorney's Office
Suite 1500
910 Travis
PO Box 61129
Houston, TX 77208

No. 96-20471 Mikkilineni v. The City of Houston
USDC No. CA-H-94-3552

Regarding the case above, the following has been filed:

> Motions filed by Appellant M R Mikkilineni for leave to file brief/record excerpts out of time, to file oversize brief of 68 pages/record excerpts of 300 pages

This matter will be **presented** for ruling **without oral argument.** Any response must be filed by opposing counsel on or before 12/27/96. Counsel will be notified by mail after the court has ruled.

Sincerely,

CHARLES R. FULBRUGE III,
Clerk

By: /s/ Carol LeSage/tdc
Carol LeSage,
Deputy Clerk

/tdc
cc: M R Mikkilineni

P.S. to counsel filing pleadings: Unless the pleading is purely procedural and/or a certificate of interested persons has already been submitted, please send the certificate required by Local Rule 27.5 by the date above.